

TSA

## United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Wayne R. Andersen	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	00 C 4090	DATE	7/3/2001
CASE TITLE	42 <sup>nd</sup> Parallel North vs. E. Street Denim Co. et al		

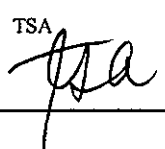
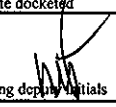
[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

## MOTION:

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## DOCKET ENTRY:

(1)	<input type="checkbox"/>	Filed motion of [ use listing in "Motion" box above.]
(2)	<input type="checkbox"/>	Brief in support of motion due _____.
(3)	<input type="checkbox"/>	Answer brief to motion due _____. Reply to answer brief due _____.
(4)	<input type="checkbox"/>	Ruling/Hearing on _____ set for _____ at _____.
(5)	<input type="checkbox"/>	Status hearing[held/continued to] [set for/re-set for] on _____ set for _____ at _____.
(6)	<input type="checkbox"/>	Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.
(7)	<input type="checkbox"/>	Trial[set for/re-set for] on _____ at _____.
(8)	<input type="checkbox"/>	[Bench/Jury trial] [Hearing] held/continued to _____ at _____.
(9)	<input type="checkbox"/>	This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to] <input type="checkbox"/> FRCP4(m) <input type="checkbox"/> General Rule 21 <input type="checkbox"/> FRCP41(a)(1) <input type="checkbox"/> FRCP41(a)(2).
(10)	<input checked="" type="checkbox"/>	[Other docket entry] <b>Enter MEMORANDUM, OPINION AND ORDER: 42<sup>nd</sup> Parallel North's amended complaint is dismissed. This case is hereby terminated, and this is a final and appealable order.</b>
(11)	<input checked="" type="checkbox"/>	[For further detail see order attached to the original minute order.]

<input type="checkbox"/> No notices required, advised in open court. <input type="checkbox"/> No notices required. <input type="checkbox"/> Notices mailed by judge's staff. <input type="checkbox"/> Notified counsel by telephone. <input checked="" type="checkbox"/> Docketing to mail notices. <input checked="" type="checkbox"/> Mail AO 450 form. <input type="checkbox"/> Copy to judge/magistrate judge.	TSA 	courtroom deputy's initials  	ED-7 FILED FOR DOCKETING 01 JUL -5 PM 5:	number of notices	Document Number  28
				JUL -6 2001 date docketed	
				 docketing deputy initials	
				7 date mailed notice	
				mailing deputy initials	
Date/time received in central Clerk's Office					



Sherman Antitrust Act and the Clayton Act. Counts II and III are state based tortious interference claims against E Street only. Each defendant filed a separate motion to dismiss.

The plaintiff's well-pleaded allegations, which the Court treats as true and views in a light most favorable to the plaintiff for purposes of this motion, are as follows:

42<sup>nd</sup> Parallel opened in June 1996 and carried product lines from Buffalo, Western Glove and Grass Roots. Clothing from these three manufacturers was in demand by 42<sup>nd</sup> Parallel customers and sales of the defendant manufacturer's clothing represented a significant portion of 42<sup>nd</sup> Parallel's revenue.

42<sup>nd</sup> Parallel contends that Buffalo, Western Glove, and Grass Roots stopped doing business, and Urban Outfitters refused to begin doing business with 42<sup>nd</sup> Parallel because E Street threatened the distributors. Specifically, Buffalo refused to fill 42<sup>nd</sup> Parallel's orders for basic items and shipped unpopular styles and sizes claiming that it was experiencing supply problems or had lost the orders. At the same time, Buffalo was shipping to E Street and other stores in the area the same products 42<sup>nd</sup> Parallel was unable to obtain. Western Glove also failed to ship requested items to 42<sup>nd</sup> Parallel claiming that the orders were lost or not received. Although they had done business for several years, Grass Roots refused to accept any more orders from 42<sup>nd</sup> Parallel. Although 42<sup>nd</sup> Parallel sought to carry the Urban Outfitters' line of clothing, Urban Outfitters refused to do business with 42 Parallel.

According to 42<sup>nd</sup> Parallel, as a result of E Street's alleged threats, consumers have paid inflated prices for the defendant manufacturers' brands because price competition between E Street and 42<sup>nd</sup> Parallel has been eliminated. 42<sup>nd</sup> Parallel further alleges that as a result of the defendants' practices it has lost retail sales in excess of \$500,000 and customer satisfaction has been eroded.

## DISCUSSION

A motion to dismiss should not be granted unless it “appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 45-46 (1957). We take the well-pleaded allegations of the complaint as true and view them, as well as reasonable inferences therefrom, in the light most favorable to the plaintiff. Balabanos v. North American Inv. Group, Ltd., 708 F. Supp. 1488, 1491 (N.D. Ill. 1988). In the context of antitrust cases, the allegations of the plaintiff which are taken as true, including allegations about intent and purpose, must at least outline a Sherman Act violation to survive a 12(b)(6) challenge. Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7<sup>th</sup> Cir. 1984).

In the various motions to dismiss, the defendants challenge 42<sup>nd</sup> Parallel’s complaint on the grounds that 42<sup>nd</sup> Parallel: (1) has not properly alleged the existence of a conspiracy between E Street and the manufacturers; (2) has failed to properly define the relevant market; and (3) has failed to allege injury to competition which had an adverse impact on the market.

### I. Antitrust Claims

The prerequisite to every Sherman Act Section 1 claim is that the plaintiff allege and prove the existence of some “contract, combination . . . or conspiracy in restraint of trade.” 15 U.S.C. § 1. Because 42<sup>nd</sup> Parallel alleges an agreement between firms at different levels of the distribution chain, the alleged agreement is deemed to be a vertical agreement, as opposed to a horizontal agreement between competitors. Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 730 (1988).

In this case, 42<sup>nd</sup> Parallel has made no allegations of price fixing, which is per se illegal under the Sherman Act. Absent allegations of price fixing, an alleged conspiracy between

businesses at different levels of the distribution chain requires a rule of reason analysis.

Monsanto Co. v. Spray-Right Service Corp., 465 U.S. 752, 761 (1984). Under the rule of reason, plaintiff must allege a conspiracy that imposes an unreasonable restraint on trade within a relevant market. A-Abart Electric Supply, Inc. v. Emerson Electric Co., 956 F.2d 1399, 1403 (7<sup>th</sup> Cir. 1992).

In this case, 42<sup>nd</sup> Parallel adequately alleges that a conspiracy exists. While details of the conspiracy are sparse (such as specific threats and timing of these threats), at this stage bare allegations would be enough. However, to survive a motion to dismiss analyzed under the rule of reason, the plaintiff must also allege the anticompetitive effects of the alleged conspiracy on the market.

The defendants argue that 42<sup>nd</sup> Parallel has failed to allege the proper relevant market. The market alleged by 42<sup>nd</sup> Parallel is the retail clothing market located in narrow area of Highland Park. Whether this is an accurate description of the relevant market for purposes of determining an antitrust violation is a factual matter that cannot be dismissed on its face. AG Fur Industrielle Elektronik Agie v. Sodick Company, Ltd., 748 F. Supp. 1305, 1316-17 (N.D. Ill. 1990).

However, 42<sup>nd</sup> Parallel's failure to sufficiently allege an anticompetitive effect on the market is fatal to its complaint. The purpose of the Sherman Act is to protect "competition not competitors." Bruswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) citing Brown Shoe Co. v. U.S., 370 U.S. 294, 320 (1962). It is not enough for 42<sup>nd</sup> Parallel to allege injury to its business, it must also allege an injury to the market. Car Carriers, Inc., 745 F.2d at 1107. A manufacturer's decision to terminate an at will contract with a retailer and maintain a similar contract with another retailer is not an example of an anticompetitive effect. Great Escape, Inc. v. Union City Body Company, Inc., 791 F.2d 532, 539 (7<sup>th</sup> Cir.

1986). The fact that 42<sup>nd</sup> Parallel may be driven out of business is not sufficient. Elimination of a competitor reduces competition, but that is not the relevant consideration in determining whether the antitrust laws have been violated. Id. at 540. "The antitrust laws are not designed to guarantee every competitor a tenure in the marketplace." Id.

The complaint is void of any allegation that E Street has established a monopoly on the defendant manufacturers' product lines. In fact, the allegation in the complaint that other competitors in the market are receiving the products 42<sup>nd</sup> Parallel is unable to obtain illustrates that competition for consumers is alive and well in Highland Park.

42<sup>nd</sup> Parallel also fails to allege that E Street had the significant market power as a retailer to influence the manufacturer of items 42<sup>nd</sup> Parallel claims is in such demand in Highland Park. "A threshold inquiry in any Rule of Reason case is whether the defendant had market power, that is, the 'power to raise prices significantly above the competitive level without losing all of one's business.'" Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 666 (7<sup>th</sup> Cir. 1987) quoting Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 (7<sup>th</sup> Cir. 1982). 42<sup>nd</sup> Parallel has not alleged any facts, nor could it, to support the inference that E Street had the sufficient power to set the price for the defendant manufacturers' product lines. We do not believe that this competitive battle between two little shops in Highland Park rises to the level of a federal antitrust violation, although remedies may exist under state law.

For these reasons, 42<sup>nd</sup> Parallel has failed to establish an anticompetitive effect on the market, and its antitrust claims in Count I of the amended complaint must be dismissed.

## II. State Tort Claims


Counts II and III of the amended complaint set forth claims against E Street under Illinois common law. Count II alleges a cause of action for tortious interference with contractual relations and Count III alleges a cause of action for tortious interference with prospective economic advantage. Subject matter jurisdiction over Counts II and III are predicated solely on the court's supplemental jurisdiction.

Generally, "when all the federal claims are dismissed before trial, the district court should relinquish jurisdiction over pendent state law claims rather than resolving them on the merits. Kennedy v. Schoenberg, Fisher & Newman, Ltd., 140 F.3d 716, 727 (7<sup>th</sup> Cir. 1998). See also Centres, Inc. v. Town of Brookfield, Wisc., 148 F.3d 699, 704 (7<sup>th</sup> Cir. 1998). Because there are no surviving federal claims in this case, we decline to exercise supplemental jurisdiction over the state law claims set out in Counts II and III.

### CONCLUSION

For the foregoing reasons, 42<sup>nd</sup> Parallel North's amended complaint is dismissed. This case is hereby terminated, and this is a final and appealable order.

It is so ordered.

  
Wayne R. Andersen  
United States District Judge

Dated: July 3, 2001